

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
COVID-19 Telehealth Program) WC Docket No. 20-89

REPORT AND ORDER

Adopted: February 2, 2021

Released: February 2, 2021

By the Commission:

I. INTRODUCTION

1. In this Report and Order, we take the next step toward committing funding through the COVID-19 Telehealth Program (Program) by finding it is in the public interest to expand the administrative responsibilities of the Universal Service Administrative Company (USAC) to include the Program. The ongoing COVID-19 pandemic has caused unprecedented stress on the Nation’s health care system. As health care providers have struggled to provide urgently needed care, telehealth has emerged as an essential resource to combatting the pandemic. In March 2020, Congress allocated \$200 million to the Commission to establish a program to help health care providers offer telehealth and connected care services and connected devices to patients at their homes or mobile locations in response to the COVID-19 pandemic.¹ The Commission established the Program and committed this funding to health care providers across the country.² In December 2020, Congress appropriated an additional \$249.95 million for a second round of funding for the Program under the Consolidated Appropriations Act, 2021.³

II. BACKGROUND

2. In addition to appropriating additional funding to the Program, the Consolidated Appropriations Act required the Commission to seek comment on “the metrics the Commission should use to evaluate applications for funding” and “how the Commission should treat applications filed during the funding rounds for awards from the Program using amounts appropriated under the CARES Act”⁴ On January 6, 2021, the Wireline Competition Bureau (Bureau) released a Public Notice seeking

¹ The Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No 116-136, 134 Stat. 281 (2020) (CARES Act).

² *Promoting Telehealth for Low-Income Consumers; COVID-19 Telehealth Program*, Report and Order, 35 FCC Rcd 3366 (2020) (*COVID-19 Report and Order*).

³ Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182, Division N-Additional Coronavirus Response and Relief, Title IX-Broadband Internet Access Service, § 903 “FCC COVID-19 Telehealth Program” (2020).

⁴ *Id.* Section 903(b), *Additional Appropriation*, provides as follows: “Out of amounts in the Treasury not otherwise appropriated, there is appropriated \$249,950,000 in additional funds for the COVID-19 Telehealth Program, of which \$50,000 shall be transferred by the Commission to the Inspector General of the Commission for oversight of the COVID-19 Telehealth Program.” Section 903(a)(3), in turn, defines the term “COVID-19 Telehealth Program” to mean “the COVID-19 Telehealth Program established by the Commission under the authority provided under the heading ‘salaries and expenses’ under the heading ‘Federal Communications Commission’ under the heading ‘INDEPENDENT AGENCIES’ in title V of Division B of the CARES Act (Public Law 116-136; 134 Stat. 531).” (case formatting in the statute).

comment on these matters, as well as on how to meet the Consolidated Appropriations Act's other requirements for the Program, and on improvements to the application, review, and invoicing processes.⁵ Among other things, the *January 6th Public Notice* proposed using USAC to assist in the remaining work needed to administer the initial round of funding appropriated to the Program by the CARES Act (Round 1), as well as to administer the second round of funding appropriated to the Program through the Consolidated Appropriations Act (Round 2).⁶

III. DISCUSSION

3. After careful review of the record, and consideration of the Commission's staff resources and the need to expeditiously implement Round 2 of the Program, we adopt the proposal to direct USAC to administer the remainder of Round 1, which includes, but is not limited to, conducting an initial review of invoices, providing outreach and guidance to stakeholders about the invoicing processes, and processing post-program feedback reports. We similarly direct USAC to administer all of Round 2 of the Program, which includes, but is not limited to, updating the portal that will be used by applicants, reviewing applications consistent with the metrics to be established by the Commission in a subsequent order, conducting an initial review of invoices, providing outreach and guidance to stakeholders about the application and invoicing processes, and administering any required audit and reporting requirements. For both the remainder of Round 1 and all of Round 2 of the Program, the Commission will retain the final funding decision-making authority.⁷

4. The CARES Act, which authorized the Commission to create the Program, allows the Commission to rely on its rules under Part 54, *i.e.*, to use the services of USAC, if the Commission determines that doing so is in the public interest.⁸ During Round 1 of the Program, the Commission made this public interest finding and directed USAC to help administer a narrow portion of the Program by processing eligibility determinations and promoting the Program to interested stakeholders.⁹ Based on the lessons learned during Round 1, the need to complete Round 1 and swiftly implement Round 2 of the Program, USAC's extensive experience, and the support of commenters in the record, we find it is in the public interest to direct USAC to administer the remainder of Round 1 and all of Round 2 of the Program under the Commission's oversight.¹⁰

5. USAC has more than 20 years of expertise developed from administering the Commission's Universal Service Fund programs, which includes, but is not limited to, conducting applicant outreach, developing application systems, reviewing funding requests, and processing requests for disbursement. Given USAC's long-standing, successful record of administering the Universal Service Fund programs, directing USAC to administer this Program would ensure the expeditious implementation of Round 2 of the Program and efficient continuation of the remaining work of Round 1 of the Program.

⁵ *Wireline Competition Bureau Seeks Comment On COVID-19 Telehealth Program Application Evaluation Metrics*, WC Docket No. 20-89, Public Notice, DA 21-14 (rel. WCB Jan. 6, 2021) (*January 6th Public Notice*). We note that the *January 6th Public Notice* raised additional matters that we anticipate will be resolved in the near future.

⁶ *January 6th Public Notice* at 6, para. 18.

⁷ *Id.*

⁸ CARES Act, Pub. L. No 116-136, 134 Stat. 281, 531 (2020) (“[T]he Federal Communications Commission may rely on the rules of the Commission under part 54 of title 47, Code of Federal Regulations, in administering the amount provided under the heading in this Act if the Commission determines that such administration is in the public interest.”). See 47 CFR Subpart H (Administration) (designating USAC as the administrator of the Universal Service Fund and describing USAC's role).

⁹ *COVID-19 Report and Order*, 35 FCC Rcd at 3378-79, 3383, paras. 22, 33.

¹⁰ See, e.g., Duke Health Comments at 4; UnityPoint Comments at 2, University of Alabama Comments at 11, Virginia Telehealth Network Comments at 6.

In addition, using USAC in this manner will allow for more efficient allocation of Commission staff resources.

6. The record further supports using USAC for the administration of the remainder of Round 1 and all of Round 2 of the Program. Commenters that opined on this matter supported the proposal to have USAC administer the Program,¹¹ and at least one commenter noted USAC's successful administration of the Rural Health Care Program.¹² Although another commenter noted that USAC would need additional resources to accommodate this work,¹³ we intend to allocate a sufficient amount of administrative expenses from our COVID-19 Telehealth appropriation to USAC so that it can successfully mobilize the necessary resources to administer the Program.

7. Consistent with its role in administering the Universal Service Fund programs, USAC's role for the Program will be limited to program administration; USAC will not have authority to make policy decisions for the Program.¹⁴ As indicated above, the full Commission will establish award metrics in a subsequent order. Thereafter, Commission staff will provide USAC with additional guidance as necessary regarding remaining Round 1 responsibilities, the Round 2 application review process, the Round 2 application prioritization criteria, the Round 2 invoice review process, and any other related administrative functions required to implement the Program. Given the ongoing nature of the pandemic, and the urgent need for the Program, we find that it is in the public interest to designate USAC as the administrator for the Program at this time so that it can expeditiously put into place any necessary administrative resources and processes while the Commission and its staff continue to evaluate policy questions.

8. We delegate financial oversight of this program to the Commission's Managing Director and direct the Office of the Managing Director (OMD) to work in coordination with the Bureau to ensure that all financial aspects of the program have adequate internal controls. These duties fall within OMD's current delegated authority to ensure that the Commission operates in accordance with federal financial statutes and guidance.¹⁵ Such financial oversight must be consistent with the metrics to be established by the Commission in a subsequent order, and any Commission rules and policies to the extent these are applicable to the Program. OMD performs this role with respect to USAC's administration of the Commission's Universal Service programs¹⁶ and we anticipate that OMD will leverage existing policies

¹¹ See, e.g., Duke Health Comments at 4; UnityPoint Comments at 2, University of Alabama Comments at 11, Virginia Telehealth Network Comments at 6.

¹² UnityPoint Health Comments at 2.

¹³ See, e.g., SHLB Comments at 7.

¹⁴ 47 CFR § 54.702(c).

¹⁵ 47 CFR § 0.11(a)(3)-(4) (stating that OMD will “[a]ssist the Chairman in carrying out the administrative and executive responsibilities” and “[a]dvise the Chairman and Commission on management, administrative, and related matters; review and evaluate the programs and procedures of the Commission; initiate action or make recommendations as may be necessary to administer the Communications Act most effectively in the public interest”); 47 CFR § 0.11(a)(8) (stating that OMD's current responsibility is to “[p]lan and manage the administrative affairs of the Commission with respect to the functions of . . . budget and financial management”); 47 CFR § 0.5(e) (requiring Bureau and Office coordination with OMD on recommendations “that may affect agency compliance with Federal financial management requirements”).

¹⁶ See, e.g., Memorandum of Understanding Between the Federal Communications Commission and the Universal Service Administrative Company (Dec. 19, 2018) <https://www.fcc.gov/sites/default/files/usac-mou.pdf> (stating that the Commission is responsible for the effective and efficient management and oversight of the USF, including USF policy decisions, and USAC is responsible for the effective administration of the programs).

and procedures, to the extent practicable and consistent with section 903,¹⁷ to ensure the efficient and effective management of the program. We anticipate that among the first acts OMD will perform to ensure satisfaction of its financial management obligations is the execution of a memorandum of understanding, or similar agreement, with USAC. Finally, we note that OMD is required to consult with the Bureau on any policy matters affecting the program, consistent with section 0.91(a) of the Commission's rules.

9. In its administration of the Program, USAC is directed to comply with, on an ongoing basis, all applicable laws and Federal government guidance on privacy and information security standards and requirements, such as the Privacy Act,¹⁸ relevant provisions in the Federal Information Security Modernization Act of 2014,¹⁹ National Institute of Standards and Technology publications, and Office of Management and Budget guidance.

10. We find that the *January 6th Public Notice* provided sufficient notice and allowed for suitable public comment on our proposal to allow USAC to administer the Program.²⁰ However, out of an abundance of caution, we also determine that using additional notice and comment procedures for the administration of this emergency relief Program, and thereby delaying its effectiveness by at least several months, would be impracticable and contrary to the public interest.²¹ The good cause exception to the notice and comment procedures of the Administrative Procedure Act “excuses notice and comment in emergency situations, or where delay could result in serious harm.”²² “In determining whether good cause exists, an agency should ‘balance the necessity for immediate implementation against principles of fundamental fairness which require that all affected persons be afforded a reasonable amount of time to prepare for the effective date of its ruling.’”²³

11. As a general matter, we believe that public notice and comment requirements are an essential component of our rulemaking process. In this case, however, because of the unprecedented nature of this pandemic and the need for immediate action, we find there is good cause for forgoing a formal Notice of Proposed Rulemaking here. Delaying USAC's ability to prepare for the administration of the Program would result in a delay in the commitment and use of Program funds. In light of the continued spread and devastating impact of COVID-19, and the continued urgent need to address this

¹⁷ Examples of differences between the programs with respect to fiscal matters include the fact that while the Universal Service Fund is a permanent indefinite appropriation and has a temporary exemption from the Antideficiency Act, the funds appropriated for the COVID-19 Telehealth Program are definite in amount and are subject to the Antideficiency Act, which is codified as amended at 31 U.S.C. §§ 1341, 1342, 1351, and 1517. In addition, the CARES Act oversight provisions have been incorporated by reference in the Consolidated Appropriations Act and would apply to this program. Consolidated Appropriations Act, 2021, H.R. 133, div. O, tit. VIII—Pandemic Response Accountability Committee Amendments § 801, Amendment to the Pandemic Response Accountability Committee (2020). Moreover, Congress has specified that “not later than 15 days before the Commission first commits funds under this section [903], the Commission shall provide notice to the appropriate congressional committees of the metrics the Commission plans to use to evaluate applications for those funds.” Consolidated Appropriations Act, 2021, at § 903(c)(1)(B).

¹⁸ 5 U.S.C. § 552a.

¹⁹ The Federal Information Security Management Act of 2002 (FISMA), enacted as Title III, E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2946 (Dec. 17, 2002), was subsequently modified by the Federal Information Security Modernization Act of 2014 (Pub. L. No. 113-283, Dec. 18, 2014). As modified, FISMA is codified at 44 U.S.C. §§ 3551 *et seq.*

²⁰ *January 6th Public Notice* at 6, para. 18.

²¹ 5 U.S.C. § 553(b).

²² *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (citations omitted).

²³ *Omnipoint Corp. v. FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996) (citation omitted).

public health crises, any further delay in the use of Program funds to assist health care providers in meeting the health care needs of their patients could impede efforts to mitigate the spread of the disease, and would also frustrate Congress's decision to declare an "emergency period" when it appropriated \$200 million for Round 1 of the Program.²⁴ This emergency relief imposes a minimal regulatory burden on any parties and serves to expedite the commitment of appropriated funds to help health care providers combat this global pandemic. For the same reasons, and because USAC must begin preparations as soon as practicable to handle the tasks we have assigned to it, we also find good cause to make the rules granting this relief effective immediately upon release of this Report and Order.²⁵

IV. PROCEDURAL MATTERS

12. *Paperwork Reduction Act Analysis.* This document contains no new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13.

13. *Congressional Review Act.* The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), concurs that the rules adopted herein are "non-major" under the Congressional Review Act, 5 U.S.C. § 804(2). Because we find for good cause that notice and public procedure on the rules adopted herein is impracticable, unnecessary, or contrary to the public interest, this Report and Order will become effective immediately upon release pursuant to 5 U.S.C. § 808(2). The Commission will send a copy of this Report and Order to Congress and the Government Accountability Office pursuant to 5 U.S.C. § 801(a)(1)(A).

V. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 201, 254, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201, 254, 303(r), and 403, DIVISION B of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No 116-136, 134 Stat. 281, and DIVISION N of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182, this Report and Order IS ADOPTED.

15. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 808(2) of the Congressional Review Act, 5 U.S.C. § 808(2), this Report and Order SHALL BECOME EFFECTIVE immediately upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁴ CARES Act, Pub. L. No 116-136, 134 Stat. 281, 531 (2020) ("For an additional amount for 'Salaries and Expenses', \$200,000,000, to remain available until expended, to prevent, prepare for, and respond to coronavirus, domestically or internationally, including to support efforts of health care providers to address coronavirus by providing telecommunications services, information services, and devices necessary to enable the provision of telehealth services **during an emergency period**, as defined in section 1135(g)(1) of the Social Security Act (42 U.S.C. 1320b-5(g)(1))") (emphasis added).

²⁵ 5 U.S.C. § 553(d); *see also* 47 CFR §§ 1.103(a), 1.427(b).